

Collective
Bargaining



Improved
Institutional
Setup



Policy Options
for
**Improving Industrial Relations
in Nepal**



Labour Act
Reform

Arbitration
Council



Alternative
Dispute
Resolution

Anita Krishnan
& Astha Joshi

Edited by
Arpita Nepal

Published by
Samridhi, The Prosperity Foundation

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Samriddhi, The Prosperity Foundation

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Preface

The Nepal Economic Growth Agenda (NEGA), first released in 2012, is an annual effort of Samriddhi Foundation to identify key constraints to Nepal's economic growth and policy options for reform. This policy analysis paper titled "Policy Options for Improving Industrial Relations in Nepal" is prepared under the banner of NEGA 2014, which is preceded by NEGA 2012 and NEGA 2013. NEGA 2012 identified and discussed policy constraints in five growth sectors of Nepal viz. Agriculture, Education, Hydropower, Transport Infrastructure, and Tourism. NEGA 2013 focused on six cross-cutting issues viz. Industrial Relations, Contract Enforcement, Anti-Competitive Practices, and Foreign Direct Investment, Public Enterprises, and Regulatory environment for doing business. NEGA 2014 builds on The Foundation's previous studies on hydropower, industrial relations and public enterprises. Of the three study reports produced under NEGA 2014, this study on industrial relations critically analyzes the contentious labor relations in the country along with the mechanisms that are used in dealing with the same.

Diversity of interest at any workspace creates natural tendencies towards disputes and conflict. Historically, this kind of conflict has been effectively handled at the enterprise level through grievance handling and collective bargaining mechanisms. However, when disputes are not appropriately handled industrial relations become strained resulting in disruption of work, low productivity, and a failing industry in extreme cases. Much like elsewhere strained industrial relations of Nepal manifest in the form of labor unrest, lockout, and strikes.

As of now, disputes arisen thus are dealt with in two ways – either through negotiations at the enterprise or industry level or through labor courts. The 'only' labor court in Nepal, however, is characterized by inefficiency and ineffectiveness due to lack of resources (human, financial and technical),

and, bureaucratic hassles. Across the industrial corridors, there also exist 10 labor offices in Nepal to mediate disputes and carry out labor inspections in industries. However, these offices are ill equipped and often do not have adequate human resources to carry out the functions that they have been assigned by law. Negotiations between employers and employees have been strained due to many factors. In the absence of a mechanism that can effectively and efficiently manage strained industrial relations the need of the hour is to either strengthen the current set up or to look for alternatives that can better handle contentious labor issues.

This paper, thus, seeks to understand the problems associated with the current institutional setup, and examine alternative dispute resolution mechanism as a viable alternative to improving industrial relations in Nepal. A cost benefit analysis (not in monetary terms) on the alternative has been framed (in terms of its probable future applicability). In doing so, comparisons have been drawn from countries around the globe.

It looks at how disputes, both of rights and interests, are addressed as per the available legal resources. As the groundwork for this research required consultations with a myriad of stakeholders namely industrialists, representatives from trade unions, laborers, lawyers and academicians—effort has been made to minimize biased opinions as much as possible. While understanding the industrial backdrop, this paper sought to identify problems in the given legal setup, spanning from laws to mechanisms used to the process of implementation. Adding on to our previous paper on contract enforcement, this also looks into Alternative Dispute Resolution mechanisms. It also suggests ways through which industrial relations in the country can be improved.

Abbreviations and Acronyms

ANTUF	All Nepal Federation of Trade Unions
ADR	Alternative Dispute Resolution
CoNEP	Confederation of Nepalese Professionals
CPN	Communist Party of Nepal
DoI	Department of Industries
DoL	Department of LaborHCIL Hetauda Cement Industry Ltd.
FNCCI	Federation of Nepalese Chambers of Commerce and Industry
GEFONT	General Federation of Nepalese Trade Unions
ILO	International Labor Organization
NEGA	Nepal Economic Growth Agenda
NTUC-I	Nepal Trade Union Congress – Independent OECD
IDRC	Industrial Dispute Resolution Council

The Nepali year is based on the Bikram Sambat Calendar and is approximately 57 years ahead of the Gregorian calendar (2062/1/1=2005/4/14)

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1. The backdrop: Industrial relations in Nepal

Many reasons exist for the souring of industrial relations in any given country. In the case of Nepal, however, institutional weakness between the three prime parties i.e. unions as the representative of the laborers, employers, and the government has been a major reason. The infamy in Nepal's case has resulted from the inability of both employers and employees to agree and commit to acceptable terms of negotiation, and the failure of the government institutions to respond when both parties are in breach of their commitment (Nepal, Neupane & Acharya 2013).

High expectations of the workers, lawlessness in the country, multiple trade unions (and many times antagonistic towards each other) operating in a single enterprise, lack of industrial culture, changing social and economic conditions, lack of effective enforcement of the existing labor related laws, declining capacity of the enterprises to provide more employment, and fulfill the inability to the growing demands of the workers have direct impact on the industrial relation and economic performance of the enterprise (FNCCI, 2010). Given Nepal's feudal background, industrial relations have been constrained due to malpractices and the persistence of feudal attitudes on both sides (Karoobar National Economic Daily, 2014).

Even though this presents a dismal picture, our consultations with representatives from all the three parties (employees, employers and the government) have indicated that there is hope. With all the parties acknowledging the role of mutual goodwill and understanding, efforts are being made to ensure cordial relations in the industries so that the benefits

henceforth can be enjoyed by all. Improvement in industrial relations has also helped boost investors' confidence.¹

1.1 Dispute resolution: Legal manifestations

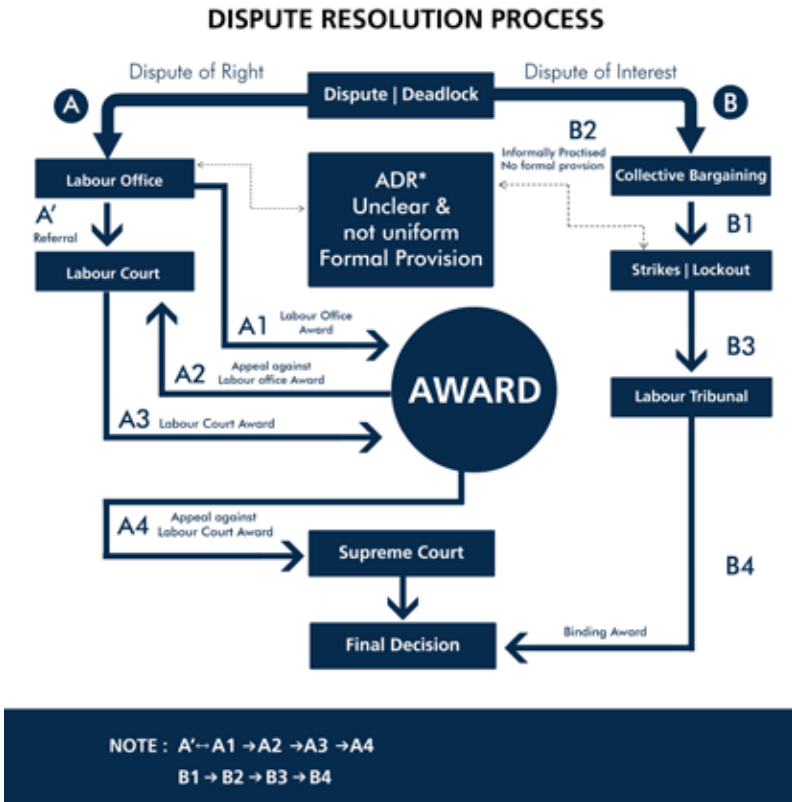
The legal framework of Nepal recognizes two forms of disputes viz. Personal Disputes and Collective Disputes. The Interim Constitution of Nepal, sub article (1) of article 30 guarantees right of labor and states that every worker and employee has the right to form and join trade unions and the right to engage in collective bargaining procedures. Under the Labor Act, industrial disputes can be raised formally by collective bargaining agent, i.e. trade unions or the employers. Collective disputes are handled through the Trade Unions in Nepal according to the rules and procedures stated in the Labor Act.

Section 72 of the Labor Act 2048 (1992) has a provision of the establishment of Labor Court which oversees labor dispute resolution. The Act only lists mediation as a form of alternative dispute resolution. Disputes that arise are dealt with in either Labor Court, which is a judicial body, or through labor offices, which are quasi-judicial in nature.

Figure 1 and the brief discussion of the procedures that follow give a glimpse into the formal system of dispute resolution in Nepal (for both disputes of rights and disputes of interest). Dispute of rights include collective arrangements like hours of work, leave, pay, unfair dismissal, terms of employment, etc. and can be enforced through the court. Disputes of interests include issues of equality/discrimination, workplace conflicts, grievance and disciplinary issues, etc. Interest disputes typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated (ILO, 2007). Disputes of rights are covered by Article 73 and Disputes of Interests are covered by Article 74 of the Labor Act, 1992.

¹ See Karobar Daily, 2014a at <http://www.karobardaily.com/news/2014/02/significant-improvement-in-labor-relations>

Figure 1: Dispute Resolution Process.



i. Handling of dispute of rights

A: The first stage involves the workers or employees submitting a written notice of the problems with the proprietor who upon receiving it would have to hold discussion with the concerned worker and settle the problem within 15 days.

A': (The Labor Office rarely refers the case to the Labor Court.)

A1: Failure to hold the discussion leads to the second stage that involves submitting a written application to the labor office after which a mutual discussion is held between the disputing parties and it has to be solved within 15 days. In case of failure to resolve, Chief of the Labor Office is given the discretion to convert the proceedings into a hearing whereby a binding decision is given within 7 days.

A2: The law gives the right to disputing parties to challenge the decision in the Labor Court within 35 days from the receipt of the notice of the decision.

A3: The Labor Court decides an award

A4: The disputing parties can appeal against the award of the Labor Court in the Supreme Court. However, this rarely happens.

ii. Handling of dispute of interests

B1: Bipartite Negotiation – First stage: The law states that claims related to collective interest have to be submitted to the proprietors. The claim needs to have signatures of at least 51% of workers or employees. It also includes the name of the representative who shall present the claim. After the claim is received, talks are held between the proprietor and representative in order to solve the dispute within 21 days.

Second stage: If the collective problem is not solved within the stated time, bilateral discussion in the presence of the labor officer is conducted. The labor officer facilitates the negotiation with the disputing parties in order to come to a written collective agreement which is then registered in the Labor office.

B2: Alternative Dispute Resolution – If the dispute remains unresolved then it is referred to a mediator appointed with mutual consent of both the disputing parties. However, in case a mediator is not appointed,

a tripartite committee under mutual consent with representation from the government, workers, and employers is formed which takes a decision on the dispute within fifteen days. An appeal can be made to the Government of Nepal (GoN) within 35 days of the receipt of the decision.

Most of this is informally conducted in the presence of the trade unions, disputing parties, and officers from Department of Labor. It is during such informal discussions that trade-offs are negotiated.

B3: Strikes : If neither mediator nor committee make a decision within this timeframe and if the GoN does not come to decision within 60 days of the filing of the appeal, the workers or employees can call for a strike. The workers/employees have to submit a notice 30 days in advance in order to call for a strike.

Lockout – The proprietors can call for a lockout if the strikes had been called without giving prior notice by submitting the justification for lockout and getting approval from the Government of Nepal. The proprietor has to issue a notice of information to all its employees seven days in advance citing reasons as well as asking the strikes to be called off. The proprietor can conduct a lockout even without submitting the notice if there are chances of violence given that the proprietor informs the Labor Office and Department of Labor three days prior to the lockout.

B4: Labor Tribunal – The government of Nepal can constitute a tribunal if dispute is not settled. This tribunal's decision is binding on both the parties. During our consultations for this paper, the working of the tribunals was discussed and the Labour Dispute Tribunal was not considered to be effective because till date the tribunal has only presided over 4 cases out of which only 2 decisions have been implemented. The time needed to implement the decisions has been very lengthy and filled with hassles.

1.2 Problems

1.2.1 The underlying structural failure

Expectation of enforcement allows the law to cast its shadow over the way in which people, businesses, and bureaucracies behave (Adler, 2007). Only when people trust the enforcement mechanism will they make use of the services available. In Nepal, however, the trust in the justice mechanism is visibly low.

The labour court in Nepal has the power to conduct hearings in any part of the country but till date hearings have only been conducted in the capital city. The labor court currently has 14 officials and one judge (Khadka, 2012, June). Because of this, there is a clogging of case dockets and as the court proceedings are only held in Kathmandu, employers and workers from outside the valley face difficulties in accessing the judicial system for labor dispute resolution.

As per the data of the labor court, starting from the year 2052 B.S., so far 1250 cases have been registered. In the year 2070 the number of registered cases has been 141. 107 cases have not been dealt with at all and 64 cases have been on hold. There is a cumulative of 184 unresolved cases with the court. These numbers reflect the inaccessibility of the centralized court (statistics taken from the Labor Court, 2013).

The Labour Offices being quasi-judicial have both administrative and judicial powers over disputes. Matters dealing with remuneration, facilities, employment, and trade union registration are overseen by the Labor Offices. Nepal has 10 labor offices throughout the country and only 11 labor officers (World Bank, 2012). The labor enforcement and inspection mechanisms are weak. Human resources as well physical facilities are inadequate. Labor officers are mostly engaged in registration of trade unions and they don't have time for inspection (New Spotlight, 2012).

Trade unions that would ideally be responsible for ensuring the rights of individual workers have their own issues. Until 1979, Nepal's Labor Organization was the only organized entity that worked for workers' right, which however, was a government construct. The present day Trade Unions are affiliated to political parties and their ideologies and this has led to inter-union rivalries as well as clashes that have created a fragmented Labor Union movement.

The largest Trade Unions in Nepal at present are General Federation of Nepalese Trade Unions (GEFONT), Nepal Trade Union Congress-Independent (NTUC-I), and All Nepal Federation of Trade Union (ANTUF). Efforts by the GEFONT and NTUC to create a harmony in the Trade Union movement had led to the signing of the 10 points agreement with the four main national centers NTUC-I, GEFONT, DECONT and ANTUF that showed their pledge in using democratic means to work for poverty alleviation, gender equality, social security and the ratification of the ILO conventions and declarations. Furthermore, in 2011, the main trade unions also signed an agreement with the employers association for increase in wages, building social security and most importantly to avoid lockouts or any sort of closure for the next 4 years in order to maintain industrial peace (LO/FTF, 2013).

This is a commendable act geared towards resolving industrial disputes. However, given the fragmentation within the labor movement in Nepal, recent years have seen strikes and lockouts by smaller trade unions. One of the reasons for these strikes has been the need of the lesser known Trade unions to garner recognition, as in the case of the Trade Union that falls under Vaidhya led CPN-Maoist (Nepal, Acharya & Neupane 2013).

Antiquated laws are also an issue in Nepal. The Labor Act of 1992 in Nepal regulates the employment relation, working conditions, and labor dispute resolution and safety standards of the workers but as a part of the consultations, various stakeholders, especially advocates and industrialists, stated that the Labor Act of the country is not compatible with the present scenario. The Labor Act 1992 was formulated keeping in view only the

formal sector workers and hence a huge workforce of the country in unorganized informal sector has been excluded and neglected (Upadhyaya, 1998).

The laws make it difficult to dismiss workers due to which majority of the industrialists do not comply with the Labor Act regulations. Compliance implies providing permanent status to laborers based on the number of days they serve rather than their productivity. As per the Labor Act, a worker is guaranteed permanent employment by law after he/she completes the probationary period of 240 days. The policy makes it difficult to fire a worker until & unless they have committed criminal offence. Even after the workers' dismissal the worker is entitled to 90 days wage. Furthermore, the Bonus Act of 1974 entitles workers to 10% of the company's profit, 10% payment to the provident fund to match the 10% contribution of the workers and other contributions to various fringe benefits of the workers. According to Trade Union representatives, majority of the industrialists do not follow this rule and its compliance has been the topmost demand priority of the trade unions.

Industrialists, on the other hand, are advocating for a hire and fire policy. If an employee is made permanent after 240 days probation period and if it is extremely difficult to discharge an employee (unless involved in criminal activities) then there is no incentive for the employee to work and increase their productivity. Hence, the employers advocate for 'hire and fire' policy.

According to the World Bank (2012) report, out of the total number of workers involved in the formal sector 94.6% do not belong to trade unions. However, the participation rate of workers from the large firms in trade unions was significant with 96% involvement especially, in the large scale industries like manufacturing and tourism sectors. Workers' participation in unions was found to be an average of 71% amongst unionized companies. Workers' participation was higher in medium and large scale industries. However, the unions are taken as representatives of the entire workforce in the policy making process. This leaves out the voices of majority of people working in the informal economy and the workers who are not unionized.

Overall, **labor administration** in the country is very inefficient due to lack of resources and human capital. Resource crunch in terms of labor administration can be seen in the failure to create a proper database of the total number of trade unions in the country or their affiliations. It so far, has not been able to tally the total number of Trade Unions and the affiliations of the Trade Unions in the absence of a database which makes it difficult to deeply study the fragmentation of the Trade Union movement in Nepal. One of the most common complaints about the labor administration is that it is incapable of performing its duties in the mediation process owing to the lack of resources, expertise, and experience in handling labor disputes.

At large, the labour administration is incapable and weak in the enforcement of law, in monitoring, in dispute settlements, in implementation of collective bargaining agreements, and in updating labour statistics (Rimal, 1996).

1.2.2 Failure of collective bargaining and tripartite system

Harmonious industrial relation is the basis of a thriving industrial structure (Nepal & Acharya, 2013). One way of fostering such harmonious relation is through effective collective bargaining. Voluntary collective bargaining is a process through which employers or their organizations and trade unions or, in their absence, representatives freely designated by the workers discuss and negotiate their relations, regarding particular terms and conditions of work. Such bargaining in good faith aims at reaching mutually acceptable collective agreements (ASEAN-ILO, 2010).

According to Salamon (2000), collective bargaining uses negotiation between the employers and employees to come up with terms and conditions of the employment through mutual agreement. Mulvey (1986) (as cited in Chaneta, nd, p. 17) emphasizes that it also involves the application of the mutually agreed terms. And government has an important role to play in the entire process. According to Clegg (1976) (as cited in Bean, 2004, p. 102) the government's role involves making provisions for the ensuring minimum standards for employment while collective bargaining helps in finding avenue for improvement of labor conditions.

The collective bargaining process also covers the phase before actual negotiations: information sharing, consultation, joint assessments as well as the implementation of collective agreements. Where agreement is not reached, dispute settlement procedures such as conciliation, mediation and arbitration may be used (ASEAN-ILO, 2010). Nepal has failed largely in the enforcement of mutually agreed upon goal; the result of which has been contentious relations.

A labor agreement that comes out of collective bargaining must be distinguished from the usual commercial contract. Unlike most other contractual arrangements, the parties involved do not have the option of refusing to do business with each other. They must do business; they must arrive at a meeting of minds (Taylor, 1951).

Tripartism and social dialogue involving government, employers and workers can be a key competitive advantage underpinning economic competitiveness, harmonious industrial relations and overall national progress (ASEAN-ILO, 2010). And such an understanding during the process of collective bargaining can only be beneficial to all the parties involved but, sadly, such hasn't been the case.

Pant (1988) (as cited in Katuwal, 2011) points out the problems of effective collective bargaining as being small size of employment, smaller enterprises, weak labor movement with meager resources, small size of trade union membership, inter-union rivalry, and factionalism. He further adds deep-rooted distrust and misunderstanding between labor and management, lack of consolidated forms of employers' organization, absence of detailed statutory process of collective bargaining and lack of autonomy of the managers of the public sector enterprises in Nepal as leading to the failure of collective bargaining in Nepal. Similarly, lack of public appreciation, failure of government to provide necessary leadership in the area of industrial relations, absence of industrial relations policy, limited converge of the Labor Act, weak institutional base of actors, inappropriate attitudes of the employers towards workers and union representatives, and industrial relations' functions have also constrained the development of collective bargaining (Rastogi, 1989, as cited in Katuwal, 2011).

2. Possible respite for Nepal

A weak labor administration system in general, poorly trained and poorly paid labor inspectors, splintered trade unions unfamiliar with their rights and obligations (coupled with almost a total absence of collective bargaining), distrust between employers and workers and between their organizations, distrust of the government with little understanding of social dialogue and tripartism, are some terms used by Noord and Hyang to frame Cambodia's labor scenario prior to the change efforts (Noord and Hyang, 2011). It is difficult for us to frame a better case for Nepal as these primarily are our issues too.

Conflict might be inherent in workplace relations but a major respite exists in being able to manage workplace conflict effectively. Such improvements may demand a large range of policy adjustments at an institutional or legislative level (Benjamin, 2013). What we suggest here, are similar in those regards as we propose both legislative amendments and institutional reorganization. While these significantly shape the recommendations, we also look at the alternatives that can help solve the problems better.

What follows is a table on how countries around the globe have been experimenting with various ways to resolve the labor conflict.

Country	ACT/Regulation/ Body	Organizational body or system	Time	Cost	Efficiency
Cambodia	Cambodian Labour Law	Arbitration Council- an alternative dispute resolution tribunal established 2003	<ul style="list-style-type: none"> • Arbitral award within 15 days 	Funding by external agencies	<ul style="list-style-type: none"> • Average case registered: 4 per month in 2003 and 12 per month in 2010. Success rate of 70%
South Africa	Labor Relation Act (1995)	Para-state Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labor Courts	<ul style="list-style-type: none"> • CCMA: mandatory conciliation within 30 days • If unresolved referred to Arbitration • Con-Arb Process: Arbitration follows conciliation • If dispute not settled, employee has 90 days to request for referral for arbitration • CCMA requires the arbitrator to make awards with reasons within 14 days • Arbitration conclusion from the date of referral for conciliation: average of 70 days 	<ul style="list-style-type: none"> • state funded • employee's filing a case can take help from trade unions or lawyers 	<p>70% dispute settlement rate by the CCMA.</p> <p>Collective bargaining disputes- Nearly 50-60% resolved during statutory conciliation</p>

Table 1: Handling of Industrial Disputes in other countries.

Country	ACT/ Regulation/ Body	Organizational body or system	Time	Cost	Efficiency
Philippines	Act 4055 (1933) Common wealth Act 1936 Presidential Decree No.21 (1972)	Inbuilt in the collective bargaining system	<ul style="list-style-type: none"> • 30 days mandatory conciliation-mediation for all labor cases • Department of Labor <ul style="list-style-type: none"> -First, practice the Alternative Dispute Resolution (ADR) -Second, Compulsory Arbitration; -Third, prevention of strikes and lock-outs • A single entry approach (SENA) <ul style="list-style-type: none"> - Disputing parties present case before Single Entry Approach Desk Office (SEADO) -If cases could not be settled after 2 hearings they are referred to regional office for conciliation and mediation 	SENA- no cost- Transportation cost reduced/ minimal - Business cost- few man days; negligible loss	SENA approach of de-adjudication- <ul style="list-style-type: none"> • 17 cases per day with a settlement rate of 200% or more • Case of strike has decreased by 61% in the last ten years
Bangladesh	Industrial Relation Ordinance (1969) Amended Labour Act 2013	Collective bargaining system Non-governmental initiative: -Conciliation cum- Arbitration Committee (CAC) of Bangladesh Garments Manufacturers and Ex- porters Association (BGMEA)	<ul style="list-style-type: none"> • Collective Bargaining <ul style="list-style-type: none"> -Bipartite negotiation -Conciliation; Arbitration -Strikes and lockouts • Conciliation-cum-Arbitration Committee <ul style="list-style-type: none"> -Tries to solve dispute in a short time frame 	<ul style="list-style-type: none"> • state funded • employee's filing a case can take help from trade unions or lawyers 	70% dispute settlement rate by the CCMA. Collective bargaining disputes- Nearly 50-60% resolved during statutory conciliation

Table 1: Handling of Industrial Disputes in other countries.

In the light of the above discussion, some respite for Nepal could be summed up as per the following recommendations. As such, the recommendation mostly focuses on strengthening existent structures as that seems to be more cost efficient. It also provides a point of convergence to all the parties involved.

2.1 Policy Alternative – An Alternative Dispute Resolution Mechanism

The existing Labor Act 2048 (1992) has only provisioned for conciliation and mediation as ADR tools. The present need is to gradually develop a system adapting other forms of ADR before taking the matters of industrial dispute to litigation (through courts) or industrial action (strikes).

Conciliation is characterized by a third party intervention to simply bring the disputing parties together to discuss on their own and reach a mutually agreeable solution. A mediator, on the other hand, can also make proposals for a settlement, although, it depends on the parties on whether or not to accept these proposals. Arbitration is then considered as the last option of alternative dispute resolution whereby the arbitrator makes a decision at the end after hearing the arguments and looking at evidences from both sides. This is quasi-judicial in nature. Conciliation is generally used for interest disputes whereas mediation and arbitration are considered for rights dispute. Mediation is used for interest disputes, too.

Some important issues to address are presented below. The issues presented from B to E are largely based on Bovis (1994)

A) Generally, conciliation and mediation are steps taken prior to arbitration. Only when all three fail, matters are taken to court. The Labor Act (1992) of Nepal has provisioned for conciliation (through the Labor Office) and mediation in case of both personal complaints and collective dispute before the matter is taken to the court or to industrial action (strike) skipping arbitration.

B) Considering Nepal's bitter experience with frequent lockouts and strikes, an important question is also if arbitration can be proposed as an alternative to industrial action (strikes). Bovis (1994) argues in favour of this based on three reasons: "First, it allows continuation of the production process and a smooth and peaceful settlement of industrial disputes. Second, it offers better conditions for workers' representation, since not only weak trade unions but even unorganized workers may pursue their rights through it. Third, it results in a more equal redistribution of income in an economy, which is the practical outcome of a collective bargaining system, since a collective voice in labor disputes is guaranteed for all categories of workers."

C) Making distinctions between interest disputes and right disputes for arbitration is important. The American system of labor relations is based on this distinction. General practice shows that interest disputes are largely resolved through mediation and conciliation and rights disputes through adjudication.

D) Choosing a legal structure for arbitration is another important aspect of introducing this system. The legal framework guiding the process of alternative dispute resolution in industrial dispute will have to make the important choice of whether or not to allow arbitration through private entities based on competition and markets or sticking to the traditional system of only allowing already existing arbitration machinery brought about by legislation to conduct arbitration. The American system of labor relations is one of the examples allowing private ordering of arbitration in industrial dispute. However, it has a huge reliance on courts to enforce compliance. On the other hand, the Australian arbitration system only allows already existing arbitration machinery brought about by legislation to conduct arbitration.

E) Procedural issues are also important while thinking about arbitration. The two major categories in arbitration from a procedural perspective are: conventional and final offer, or pendulum arbitration. The conventional arbitration refers to a system whereby the arbitrator chooses the final outcome he thinks as appropriate after considering arguments and evidences both sides. On the final-offer or pendulum arbitration, each party

submits its package(s) and the arbitrator selects the most appropriate one. This can be done in four ways:

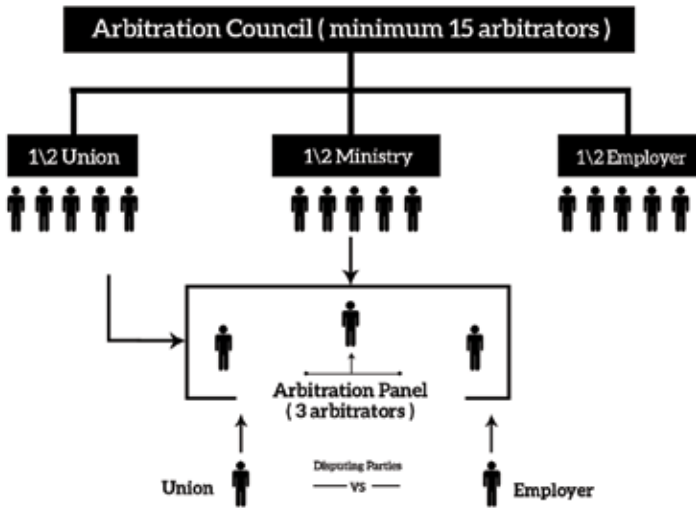
- Both parties present a package each and the arbitrator chooses one of them
- Both parties present a number of packages (with options) and the arbitrator chooses the party whose set of packages deemed appropriate allowing the concerned party to select a specific package from the set/options
- The arbitrator selects among final offers on an issue-by-issue basis from multiple options
- Parties are not bound to give final offer packages and revision is allowed in a way that arbitration could take place as continuation of negotiations.

F) The regulatory framework for ADR should mention whether or not, or which of ADR mechanisms will be voluntary or compulsory. In some countries, every industrial dispute has to go through conciliation or mediation before it is taken to arbitration or adjudication (e.g. Swaziland) whereas on other countries it depends on the nature of dispute.

G) Adapting ADR mechanisms involves setting up the necessary regulatory framework. This means reviewing laws and introducing ADR mechanisms and provisions.

H) Another important aspect is institutional set up. Nepal's Labor Act (1992) allows for a private mediator chosen by mutual consent of the disputing parties. However, arbitration, because it involves a more complex procedure as it is quasi-judicial in nature, should be tripartite (employers, employees, and government) and its awards are binding if both parties agree to it. The figure below shows the composition of Arbitration Council and the selection of an arbitration panel in Cambodia.

Figure 2: Arbitration Council of Cambodia



Source: Adler, et al. (2010)

The Arbitration Council consists of at least 15 arbitrators with equal representation for the laborers, the employers and the government. Each of these stakeholder groups nominate their respective representatives in the council. Whenever a case is registered at the Council, both the plaintiff and the defendant nominate one arbitrator each to represent them in the case proceedings. These two arbitrators then nominate the third arbitrator (from the ones nominated by the government) on mutual consensus, who later acts as the Chairman of the Arbitration Panel. The proceedings are guided by Cambodian Labor Law (article 312). The funding of the dispute resolution proceeding is covered by external agencies and this form of dispute resolution mechanism has yielded positive results in Cambodia with arbitral awards being granted within 15 days and with a 70% success rate.

2.1.1 Industrial Dispute Resolution Council in Nepal

Against the given background and international practices, this paper proposes an 'Industrial Dispute Resolution Council' in Nepal. As mentioned earlier, there needs to be a clear distinction between 'disputes of rights' and 'disputes of interests', for the proposed mechanism to be effective. The disputes of rights could then be contested in the labor court and labor offices, throughout the industrial corridor. The disputes of interests could, on the other hand, be resolved via Industrial Dispute Resolution Council. The Industrial Dispute Resolution council could function as enterprise-level mediation body.

2.1.1.1 Benefits of having a third party Industrial Dispute Resolution Council (IDRC)

i. It will allow for dispute resolution at the enterprise level

Due to the lack of appropriate legal and institutional set up for ADR to handle industrial disputes, disputes within one firm have paralyzed the entire industry, or even the nation, in some instances in the past in Nepal. Labor disputes tend to extend well beyond the enterprise and have an industrial and even economy wide impact. An interest based dispute in a single enterprise allows space for a political party to create disruptions across industries. Under such circumstances, having a third party enterprise-level dispute settlement mechanism that can mediate or conciliate, or even arbitrate a dispute among the parties at conflict and within the enterprise itself can help prevent the spread of a dispute throughout the industry or the economy.

ii. It will supplement the existing system

Nepal has only one labor court as a state-sanctioned dispute resolution mechanism. And it has only 11 labor officers throughout the nation. Criticisms against these setups have been mounting. Given the scenario, these institutions could be relieved of the additional burden of

having to resolve disputes of interests between laborers and employers by creating an IDRC which specializes in just that. Further, the expansion and strengthening of the labor courts and labor offices can also be eased up by guaranteeing that they have to focus on only a specific kind of labor disputes. A two pronged mechanism (having labor courts and a third party IDRC) could also guarantee that majority of labor disputes cases are processed.

iii. It will ease up the operations of the enterprise

The current labour policy environment of Nepal induces industrial action (lockouts or strikes) as soon as the collective bargaining attempts fail. Unfortunately, these are frequent. The negative effects are borne by the employers, workers, and the stakeholders, including the consumers of the final products. As Bovis (1994) argues, alternate dispute settlement makes room for the regular operation of the enterprise to continue peacefully, without any external deterrence. It further results in “a more equal redistribution of income in an economy.”

iv. It will allow for equal representation

In case of labor disputes in Nepal, the inability of both employers and employees to agree and commit to acceptable terms of negotiation and the failure of government institutions to respond when both parties are in breach of their commitment has been subject to much scrutiny (Nepal & Acharya, 2013).

Furthermore, litigations (of both kinds of labor disputes) in the labor courts have gone on to be perceived by employers as being labor friendly, thereby causing them to shy away from any using legal measures in terms of labor dispute resolutions. A Cambodia-style IDRC as proposed in this paper guarantees equal representation from the disputants. Furthermore, IDRC would allow representation for laborers who are not aligned to any of the labor unions within the enterprise.

v. It will reduce time and costs

Lo, Suet-ching & Sharon (2001) argue, *“Conciliation succeeds in resolving labor disputes with less time than adjudication because it concerns about the disputants incentives of maximizing their payoff through minimizing the opportunity cost and transaction cost for settlement in relation to further pursuit. Even though there were great disagreements between the management and the employees, the conciliator was able to utilize the interest maximizing incentives of the disputants by enabling them to realize the opportunity cost and transaction cost involved in further aggravation of the dispute.”*

This argument of reduced settlement periods and costs might sound a little counter-intuitive in case of Nepal. The court systems in Nepal are subsidized and if one is lucky enough, s/he could go through the entire proceedings paying just under NRs. 1000. However, the court systems in Nepal have years and years of backlogs. There are numbers of pending cases and one has to wait for upto years before his/her case proceedings begin. On top of that, the cases are elongated for a number of years.

These have huge opportunity costs for both the disputing parties. Given the drawbacks of the court system in Nepal, alternate dispute mechanisms are faster and cheaper. From international practices, it has been found that mediations can be completed (yielding mutually agreeable terms of resolution for both parties) in as much as 15 days if the parties agree to be bound by the settlement terms.

On the other hand, in case of one or both of the parties disagreeing with the result of mediation, they can go for arbitration. Assuming that labor courts (when strengthened) and IDRC have the capacities to handle the kind of cases that are referred to them, disputes could be resolved faster. Furthermore, ADR saves the disputants, especially the laborers, substantial amount of money that would otherwise have to be paid in the form of lawyer fees.

vi. It will mean increased compliance:

Alternate dispute resolution mechanisms like mediation and conciliation allow the disputants to work out the settlement on mutually agreeable terms. Even when these measures fail, final offer or pendulum offer types of arbitration allow the disputants to put forth their settlement terms and the arbitrator gives the award on the basis of the settlement terms floated. Active involvement of the disputants throughout the resolution process and coming up with a reward that has been agreed upon by both the parties means a higher rate of compliance.

2.1.1.2 Challenges with implementing Industrial Dispute Resolution Council

Despite all the benefits that could be brought about by ADRs, these can only be effective if the disputants willingly opt for ADR. Unless and until both parties express their willingness, ADRs will not deliver anything. Under the circumstances that the labor unions are heavily politicized institutions and different interest groups can manipulate these unions for achieving special benefits, it could be quite a challenge to implement the idea of IDRC. Some major challenges that could be faced in the process could be listed as follows:

i. Enforceability

Although the rewards are generally given on the basis of mutual agreement from the disputing parties, the legal sanctioning of such rewards in Nepal has had implementation issues. In case any party disrespects the terms of settlement, the whole idea of IDRC could be rendered futile. Therefore, the effectiveness of IDRC will depend heavily on whether or not the state is willing to sanction its proceedings. This will require reforming the existing labor laws of the country and acknowledging the instruments of ADR in settling industrial disputes. The enforcement of the rewards/terms of settlement will have to be guaranteed through state intervention.

ii. Direct costs to be borne by the disputants

From setting up IDRC to funding the dispute resolution tools like mediation, conciliation or arbitration—there will be costs. The very fact that IDRC looks into interest disputes of laborers means that bearing the costs of dispute resolution will be heavily opposed by the laborers. One medium term solution to this can be formulated on the basis of lessons learnt from international experiences. In Cambodia, for example, the cost of dispute resolution is borne by external agencies. In South Africa, the mechanism is heavily state funded. Therefore, one short-term respite could come from a mechanism whereby a donor agency's funding is channelized to IDRC in the form of a Labor Dispute Resolution Project (as in Cambodia). For medium goals, as IRDC gains some ground and the stakeholders (the state, the employers and the laborers) start accepting the change, these parties could be asked to cover a portion of the costs. In the long term, the funds will have to be managed from among these parties involved without any prolonged dependence on the donor agencies.

iii. Resistance and hidden agendas

It is in the benefit of certain groups to resist the formation of the council. In our case per se, many, especially trade unions have instead favored the formation of a labor commission. However, the viability of labor commission can be questioned as this would allow for further politicization of the whole labor scenario. As evinced by the labor commission's role in India, much is done in terms of framing new policies and it has only gone on to create an added legal labyrinth. In a country where the crux of the labor problem has been the institutional set up, bringing in the commission will only escalate the political dominance over the matters of industrial relations.

Labor commission is a state run mechanism—emerging economies like Cambodia have it. Such systems aren't necessarily known for giving prompt decisions. The costs of formation of an altogether different commission in the light of the present scenario which is characterized by ambiguity of laws would only add to the confusion.

3. The way forward

While industrialization has been popularly viewed as Nepal's gateway to economic growth, the sour relations between the employers and employees in the past has acted as a major hindrance in the delivery of expected results. The existing policy environment also contributes its fair share in the meager performance of the industries. However, recent trends within industries in Nepal, a number of new studies and rounds of consultations with different stakeholders during the course of this research present some hope. At present, the three major parties viz. the government, the employers and the laborers seem to have recognized the need for joining hands in order to maximize the benefits of their interaction with one-another more than ever before.

Also, at our disposal are a wide range of international experiences from countries that have faced problems similar to ours and have come up with noteworthy reforms in turning the table for their benefits. To tap into the willingness shown by the concerned parties as well as the pool of knowledge availed by international experience, this paper recommends that Nepal reform its existing labor policy and devise an alternative dispute settlement mechanism that allows for a quick and cheap way of dealing with cases of industrial disputes.

i. The Ministry of Labor, being the state organ that looks into matter of industrial relations would have to take up the responsibility of reforming the existing labor policy. In order to ease up the handling of industrial disputes, the new policy could make a clear distinction between rights-disputes and industrial-disputes. Rights-disputes could

be settled under existing state mechanism of labor court and labor offices while interest-disputes could be referred to alternate dispute resolution tools. The Development Committee Act of 1956 had first initiated the modern legal system of ADR in Nepal (Parajuli, 2013). As one of the prime problems in Nepal has been the enforcement of the decision, what is needed is a state-endorsed system of enforcement—and the binding nature of arbitration might have a role to play in those regards.

ii. The existing labor court is centralized in the capital city; thus, rendering dispute resolution service inaccessible and costly. This could be decentralized and made accessible to employers and the employees throughout the major industrial corridors of the country. The labor offices, on the other hand could be supplied with sufficient human and technical resources. The appropriation of number of labor offices and the staff has to be as per the demands in the given industrial corridor. In doing so, the overall labor administration system would have to be strengthened to meet the needs.

iii. In order to facilitate resolution of interest disputes, an Industrial Dispute Resolution Council (IDRC) could be established to house personnel that hold expertise in dealing with such cases. IDRC could have equal representation from the government, employers and employees. A mechanism could be devised whereby as soon as collective bargaining among the labor union and the employers fails at any enterprise, IDRC would appoint a mediator to look into the enterprise-specific dispute and he/she would bring together the employers and the laborers to mutually agreeable terms at the enterprise level itself. If in case even mediation should fail, IDRC would be equipped with arbitrators appointed by all three stakeholders that would form a neutral arbitral bench for the specific case and deliver an unbiased award at the soonest and at the cheapest cost.

iv. For the concept of IDRC to materialize, the existing enterprises could resort to article 87 of the existing Labor Act 1992 that

allows each enterprise to frame its own bylaw regarding the “condition of service of its workers and employees.” As their bylaws, enterprises could frame a module of their own that recognizes the distinction between the rights-disputes and interest disputes and allows for the dispute resolution to proceed as above-mentioned and submit it to the concerned labor office.

v. In order to ease up the dispute resolution process, decentralization of the labor court, strengthening of labor offices and establishment of IDRC would require substantial amount of investments and supply of funds to remunerate the officials. A short-term solution could be a mechanism whereby a donor agency’s funding is channeled to IRDC in the form of a Labor Dispute Resolution Project (as in Cambodia). The three major stakeholders (government, employers and employees) could be asked to cover a portion of the costs; eventually cutting down reliance on the donor agencies.

3.1 Conclusion

Contentious labor relations in Nepal, though not the forerunner of our economic problems at present, holds much potential to play spoil-sport in a country that is seeking to transform into a better economy. One of our major problems has been the inability to enforce laws accordingly. Although all the three parties have different takes as to what sort of a system would help solve the existent problem, neither of the parties respond negatively to the prospect of strengthening of the existent system and introducing ADR and have shown willingness to comply with the same. This implies that this is the right time to reform the Labor Act and related legal framework to create a conducive business environment with improved industrial relations.

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Samriddhi, The Prosperity Foundation an introduction

Samriddhi, The Prosperity Foundation is an independent policy institute based in Kathmandu, Nepal. It works with a vision of creating a free and prosperous Nepal.

Initiated in 2007, it formally started its operations in 2008. The specific areas on which the organization works are:

- i. Entrepreneurship development
- ii. Improving business environment
- iii. Economic policy reform
- iv. Promoting discourse on democratic values

Centered on these four core areas, Samriddhi works with a three-pronged approach—Research and Publication, Educational and Training, and Advocacy and Public Outreach.

Samriddhi conducts several educational programs on public policy and entrepreneurship. It is dedicated to researching Nepal's economic realities and publishing alternative ideas to resolve Nepal's economic problems. Samriddhi is also known for creating a discourse on contemporary political economic issues through discussions, interaction programs, and several advocacy and outreach activities. With successful programs like “Last Thursdays with an entrepreneur” and “Policy Talkies”, it also holds regular interaction programs bringing together entrepreneurs, politicians, business people, bureaucrats, experts, journalists, and other groups and individuals making an impact in the policy discourse. It also hosts the secretariat of the ‘Campaign for a Livable Nepal’, popularly known as Gari Khana Deu.

One of Samriddhi's award winning programs is a five day residential workshop on economics and entrepreneurship named Arthalya, which intends to create a wave of entrepreneurship and greater participation among young people in the current policy regime.

Samriddhi is also committed towards developing a resource center on political economic issues in Nepal called Political Economic Resource Center (PERC) currently housed at Samriddhi office. It also undertakes localization of international publications to enrich the political economy discourse of Nepal. Samriddhi was the recipient of the Dorian & Antony Fisher Venture Grant Award in 2009, the Templeton Freedom Award in 2011 and the CIPE Global Leading Practice Award in 2012.

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This policy analysis paper titled “Policy Options for Improving Industrial Relations in Nepal” is prepared under the banner of Nepal Economic Growth Agenda (NEGA) 2014, which is preceded by NEGA 2012 and NEGA 2013. NEGA is an annual effort of Samriddhi Foundation to identify key constraints to Nepal’s economic growth and policy options for reform.

This specific policy analysis paper looks at how disputes, both of rights and interests, are addressed as per the available legal resources. It also seeks to understand the problems associated with the current institutional setup, and examine alternative dispute resolution mechanism as a viable alternative to improving industrial relations in Nepal.

In providing recommendations for improving the institutional set up for collective bargaining and dispute resolution, the paper also draws comparisons among countries around the globe to suggest ways through which industrial relations in the country can be improved



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